IN THE DAVIDSON COUNTY CHANCERY COURT
AT NASHVILLE

SENTINEL TRUST COMPANY, and its Directors, Danny N. Bates, Clifton J. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien, Petitioners, v. KEVIN P. LAVENDER, Commissioner of the Tennessee Department of Financial Institutions, Respondent.	)	No. 04-1934-I

RESPONSE TO PETITIONERS' MOTION FOR REHEARING AND MODIFICATION OF THE COURT'S ORDER OF AUGUST 9, 2004, FOR OTHER RELIEF AND FOR EXPEDITED HEARING ON SUCH MOTION

Respondent, Kevin P. Lavender, Commissioner of the Tennessee Department of Financial Institutions, by and through his attorney of record, the Attorney General and Reporter for the State of Tennessee, hereby submits this response to Petitioners' motion for rehearing and modification of this Court's order of August 9, 2004, for other relief and for an expedited hearing on such motion.

I. INTRODUCTION AND BACKGROUND

On August 5, 2004, an expedited hearing was held before this Court on Petitioners' petition for a writ of supersedeas. On August 9, 2004, this Court issued an order denying the

petition. In doing so, this Court noted that Petitioners had chosen to proceed solely on the legal issue of whether the Commissioner had exceeded his statutory authority, and "not yet enter the factual fray."

On August 13, 2004, Petitioners filed a motion requesting that this Court: (1) vacate or revise its August 9th order; (2) enter final judgment for Petitioners upon both the writs of certiorari and supersedeas on the basis of the pleadings; (3) reserve to Petitioners the right to an evidentiary hearing; and, (4) grant an immediate interlocutory appeal in the event this Court declines to vacate or revise its previous order. Petitioners also requested an expedited hearing on this motion. On August 17, 2004, this Court issued an order directing the Commissioner to file a response to the motion within seventy-two (72) hours.

II. ARGUMENT

As the basis for their request that the August 9th order should be vacated or revised, Petitioners assert that this Court disregarded the law of statutory construction and

> merely adopted the Attorney-General's desired conclusion as to the meaning of a single statutory section, in support of which conclusion neither the Attorney-General nor the opinion put forth any rational using statutory construction, which — presumably subconsciously — favored the position of the Commissioner and the Attorney-General instead of impartially seeking guidance from the controlling body of law.[1]

Petitioners then cite several rules of statutory construction, which they assert this Court should have applied. Furthermore, it is their position that had the Court applied the rules, it would have necessarily reached the conclusion that the Commissioner had exceeded his statutory authority,

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[1]Motion at p. 3.

as the definition of a "state bank" has never included a trust company and the statutes in question only authorize the Commissioner to take possession and liquidate a state bank.

In arguing that this Court disregarded the rules of statutory construction, Petitioners themselves ignore the most fundamental rule of statutory construction and that is that ***the intention of the legislature must prevail.***[2] Thus, courts must ascertain and then give the fullest possible effect to the General Assembly's purpose in enacting a statute as reflected in the statute's language.[3] Furthermore, the Tennessee Supreme Court has held that where the language of a statute is clear and unambiguous, the courts must interpret the statute as written,[4] rather than using the tools of construction to give the statute another meaning.[5] Here, the language of Tenn. Code Ann. § 45-2-124 clearly and unambiguously reflects the Legislature's intent that all provisions of chapters 1 and 2 of the Banking Act apply to the operation of trust companies in this state. As such, there is no need to resort to other rules of construction to ascertain the Legislature's intent. Accordingly, this Court was correct finding that the Commissioner acted with express statutory authority in taking possession of Sentinel pursuant to Tenn. Code Ann. § 45-2-1502.

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[2]*McGee v. Best*, 106 S.W.3d 48, 64 (Tenn.Ct.App.), *p.t.a. denied* (2002)("The rule of statutory construction to which all others must yield is that the intention of the legislature must prevail."). *See also, Southern v. Beeler*, 183 Tenn. 272, 195 S.W.2d 857 (1946); *Mangrum v. Owens*, 917 S.W.2d 244, 246 (Tenn.Ct.App. 1995); *City of Humboldt v. Morris*, 579 S.W.2d 860, 863 (Tenn.Ct.App. 1978).

[3]*Jones v. Garrett*, 92 S.W.3d 835, 839 (Tenn. 2002); *Robinson v. LeCorps*, 83 S.W.3d 718, 722 (Tenn. 2002).

[4]*Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001); *ATS Southeast, Inc., v. Carrier Corp.*, 18 S.W.3d 626, 629-30 (Tenn. 2000); *Lavin v. Jordon*, 16 S.W.3d 362, 365 (Tenn. 2000).

[5]*Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001); *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000).

Petitioners, however, would have this Court ignore the clear language of Tenn. Code Ann. § 45-1-124, and instead focus solely on the definition of "state bank" to the exclusion of all other provisions of the Bank Act, to find that Tenn. Code Ann. § 45-2-1502 is inapplicable to trust companies, because it only authorizes the Commissioner to take possession of a "state bank." Such a limited construction of Tenn. Code Ann. § 45-2-1502 would be undeniably contrary to the Legislature's intent.

Generally, the search for a statute's meaning should begin with the words of the statute itself.[6] The courts must give these words their natural and ordinary meaning unless the context in which they are used requires otherwise.[7] Further, because words are known by the company they keep,[8] courts should construe a statute's words in the context of the entire statute and in light of the statute's general purpose. Additionally, courts have a duty to construe a statute so that no part will be inoperative, superfluous, void or insignificant, and so that no section will destroy another.[9]

When the plain language of a statute is reasonably capable of conveying more than one meaning, then statute is rendered ambiguous, and courts must then look to the entire statute, the statutory scheme in which the statute appears,[10] as well as the "subject matter [of the statute], the

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[6]*Blankenship v. Estate of Bain*, 5 S.W.3d 647, 651 (Tenn. 1999); *Freedom Broadcasting of Tenn., Inc. v. Tennessee Dep't of Revenue*, 83 S.W.3d 776, 781 (Tenn. Ct. App. 2002).

[7]*Nashville Golf & Athletic Club v. Huddleston*, 837 S.W.2d 49, 53 (Tenn. 1992); *Lockheed Martin Energy Sys. v. Johnson*, 78 S.W.3d 918, 923 (Tenn.Ct.App. 2002).

[8]*State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754-55 (Tenn.Ct.App. 2001)

[9]*Mangrum v. Owens,* 917 S.W.2d at 246 (citing *City of Caryville v. Campbell County*, 660 S.W.2d 510, 512 (Tenn.Ct.App., 1983); *Tidwell v. Collins,* 522 S.W.2d 674, 676 (Tenn. 1975)).

[10]*State v. Walls*, 62 S.W.3d 119, 121 (Tenn. 2001); *State v. McKnight*, 51 S.W.3d 559, 566 (Tenn. 2001).

object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment" to ascertain the legislature's intent.[11]

While the Commissioner believes that the language of Tenn. Code Ann. § 45-2-124 is plain and unambiguous and clearly expresses the Legislature's intent, to the extent that it's interplay with the provisions of Tenn. Code Ann. § 45-2-1502 creates any ambiguity, then it is appropriate for this Court to consider, among other things the legislative history of Tenn. Code Ann. § 45-2-124 (Chapter 112 of the Public Acts of 1999). Here, the legislative history reveals that both the House and Senate Sponsors stated that one of the purposes of the act was to clarify what trust companies are subject to the banking act and the control of the Commissioner.[12]

The legislative history further reveals that Public Chapter 112 was the result of a task force created by the Department of Financial Institutions in 1998 to consider new legislation to regulate trust companies.[13] This task force assisted the Department in drafting the proposed legislation, which was subsequently enacted as Public Chapter 112. Furthermore, in presenting the proposed legislation to both the Administration and the Legislative sponsors, the Department provided certain relevant information, including: (1) a section by section summary of the bill; (2) a report of anecdotal information; and (3) background information.[14]

The section by section summary states that Section 3 of the bill

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[11] *Lavin v. Jordon*, 16 S.W.3d at 366 (citing *State v. Lewis*, 958 S.W.2d 736, 739 (Tenn. 1997)).

[12] Transcripts of the House and Senate Proceedings were previously filed in support of the Commissioner's Supplemental Response to the Petition for Writ of Supersedeas.

[13] *See* Affidavit of Greg Gonzales attached hereto as Exhibit 1 and incorporated herein by this reference.

[14] *Id.*

> provides that the Banking Act shall apply to the regulation of trust companies, except to the extent that the Commissioner determines otherwise. ***This is a fundamental provision of this bill as it has not always been clear in the past what law governs the regulation and operation of trust companies.***[15] (Emphasis added).

The summary further states that Section 4 of the bill establishes how the Banking Act applies to trust companies currently subject to the Department's regulation and to grandfathered trust companies and specifically states that "[a]ll trust companies operating on July 1, 1999 shall have up to 3 years from July 1, 1999 to conform to the Banking Act."[16]

The anecdotal information report provided to the Administration and Legislative Sponsors first notes that with the passage of this proposed legislation, consumers "[w]ould be assured that trust companies offering fiduciary services in Tennessee will have some level of supervision." More importantly, this report goes on to note that the Department has identified three (3) pre-1980 trust companies that currently are not regulated by the Department pursuant to a grandfather clause and that the Department has informed these trust companies of what the proposed bill entails. Sentinel Trust Company was one of these three trust companies.[17] With respect to these three companies, the report specifically states:

> Such companies, if determined to be acting as a fiduciary, will have 3 years from the effective date of this bill to conform to these new requirements. This will put all trust companies on a level playing field and will allow the Department to address citizen concerns on all trust companies regardless of when they were formed. Closing the pre-10980 loophole will also help prevent pre-1980 out of state trust companies from trying to claim that they

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[15] *See* Exhibit A to Affidavit of Greg Gonzales.

[16] *Id.*

[17] R. Vol. I, 17, 206.

> should also not be subject to the Department's review should they seek to establish a presence in Tennessee.[18]

Finally, the background information presented by the Department to the Administration and Legislative Sponsors specifically addresses these pre-1980 trust companies and the Department's concern that they were currently not regulated.

> From the Department's experience, it also was deemed important to clarify what fiduciary activities and companies should be subject to the Banking Act. That is particularly the case for a few trust companies that are not currently regulated due to an interpretation of the Department in the early 1980's. As these few companies are apparently otherwise indistinguishable from other regulated trust companies, there should be no reason that they should not be regulated. However, the Department recognizes that an appropriate timeframe must be given such companies to allow them to adjust to regulation and that has been provided for in the legislation.[19]

This information identifies the "subject matter [of Tenn. Code Ann. § 45-1-124], the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment"[20] and conclusively establishes the Legislature's intent that ***all*** the provisions of the Banking Act apply to ***all*** trust companies in this state, pursuant to Tenn. Code Ann. § 45-1-124.

Finally, in determining the meaning of a statute, the Tennessee Supreme Court has held that courts should give deference to the interpretation of the statute followed by the

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[18] *See* Exhibit A to Affidavit of Greg Gonzales.

[19] *Id.*

[20] *See* fn. 11, *supra.*

administrative agency charged with its enforcement or execution.[21] The Department of Financial Institutions is authorized to "execute all laws relative to persons doing or engaged in a banking or other business as provided in [title 45]."[22] The Department has clearly interpreted Tenn. Code Ann. § 45-2-124 to mean that all the provisions of Chapters 1 and 2 of the Banking Act apply to all trust companies in this state, as the Department itself drafted the proposed legislation.

Moreover, the Department has consistently maintained this position as evidenced in the annual reports filed with the Governor pursuant to Tenn. Code Ann. § 45-1-119(a). The Banking Division section of the 1999 Annual Report states that "[a] major accomplishment for the [Banking] Division was the passage of Public Chapter 112 which amended the Banking Act, Tennessee Code Annotated Title 45, Chapters 1 and 2" and that among other things, this law "brings previously grandfathered trust companies under departmental jurisdiction, ..." The report goes on to state that no new trust companies were chartered in 1999, but "with the passage of Public Chapter 112, which amended the Banking Act, four previously grandfathered trust companies were brought under the Department's jurisdiction. The Division now supervises a total of 14 trust companies."[23] The Banking Division report also contains a consolidated balance sheet for all state-chartered trust companies and a consolidated income statement, as required by

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[21] *Consumer Advocate Division. Greer*, 967 S.W.2d 759 (Tenn. 1998); *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997).

[22] Tenn. Code Ann. § 45-1-104.

[23] A copy of the Banking Division section of the 1999 Annual Report is attached hereto as Exhibit 2 and incorporated herein by this reference. A complete copy of the 1999 Annual Report is available on the Tennessee Department of Financial Institutions website.

Tenn. Code Ann. § 45-1-119(a)(3) and (5). Sentinel Trust Company is specifically listed on the consolidated income statement.[24]

The Department has continued to report this information concerning state-chartered trust companies in Tennessee, including any changes occurring with respect to trust companies by reason of opening new trust companies, mergers, and dissolutions (voluntary and involuntary) in its annual reports.[25] The Department has also continued to list Sentinel Trust Company on the consolidated income statements for state-chartered trust companies regulated by the Department.

In summary, when it enacted the amendments to Tenn. Code Ann. § 45-1-124, the General Assembly intended to clarify that all state chartered trust companies are subject to all the provisions of the Banking Act. The Department of Financial Institutions has consistently interpreted that statute in a similar fashion. Finally, until the Commissioner took possession of Sentinel Trust Company, Petitioners themselves have acted consistently with this interpretation, *e.g.*, sought to amend their corporate charter, pursuant to the provisions of Tenn. Code Ann. § 45-2-218, which only speaks in terms of a state bank[26] and paid without objection the Annual Assessment Fee authorized in Tenn. Code Ann. § 45-1-118(c)(2).[27] Only now, as they face the loss of the company as a result of their gross mismanagement and possibly illegal activities, do Petitioners argue that the Commissioner's regulatory authority over trust companies is limited to

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[24]*Id.*

[25]Copies of the Banking Division section of the 2000 and 2001 Annual Reports are attached hereto as Exhibit 3 and 4, respectively, and are incorporated herein by this reference. Complete copies of the 2000 and 2001 Annual Reports are available on the Department's website.

[26]A copy of this Application and Amended and Restated Charter are attached hereto as Collective Exhibit 2 and incorporated herein by this reference. *See also*, R. Vol. 1, 191-192.

[27]*See* Affidavit of Patti Miller attached hereto as Exhibit 5 and incorporated herein by this reference.

the provisions of Tenn. Code Ann. §§ 45-1-1002-1006 and that the amendments to Tenn. Code Ann. § 45-1-124 essentially do nothing more than empower "the Commissioner to exercise his examining powers, but not his liquidating powers, to newly-regulated "trust companies" for the limited period July 1, 1999-July 1, 2002."[28]

There simply is no authority for such an interpretation and is contrary to the most fundamental rule of statutory construction that the intent of the legislature must prevail. Petitioners have presented no valid basis for vacation or modification of this Court's order of August 9th and, therefore, such motion should be denied.

Petitioners have also requested what appears to be two bites at the apple with respect to their Petition for Writ of Certiorari — a final judgment based upon the pleadings, and if that is not successful, then an evidentiary hearing. The Commissioner submits that the only appropriate judicial review is pursuant to the common-law writ of certiorari.

Tenn. Code Ann. § 45-2-1502(c)(1) provides that any person aggrieved and directly affected by the Commissioner's decision to take possession of a state bank or trust company, "may have a review by certiorari as provided in title 27, chapter 9." However, the Tennessee Supreme Court has held that the provisions of title 27, chapter 9 do not destroy the distinction between common law writs and statutory writs of certiorari, but rather only describe the

[28]At the same time Petitioners make this assertion, they appear to contradict themselves by admitting that the 1999 amendments "enacted some added rules governing trust companies in addition to increasing the types of companies (pre-1980 chartered trust companies) subject to the Banking Act." *See* Motion at p. 3.

procedure for both writs.[29] Moreover, the Supreme Court has held that so much of these statutes as prescribe a de novo hearing apply exclusively to the statutory writ.[30]

The circumstances where the remedy of the common-law writ of certiorari is available have been codified by the General Assembly in Tenn. Code Ann. § 27-8-101, which provides that "the writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceed the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy or adequate remedy."[31] The General Assembly has similarly articulated the circumstances of when the statutory writ is available in Tenn. Code Ann. § 27-8-102, which provides that certiorari lies: "(1) on suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of audita querela; or (5) instead of writ of error."[32]

Here, the Commissioner's decision to take possession and liquidate Sentinel is clearly an instance of an officer exercising a judicial (or quasi-judicial) function and, therefore, review should be under the common-law writ of certiorari, which is limited to the record for a determination as to whether the Commissioner exceeded his jurisdiction, acted illegally arbitrarily or capriciously or without material evidence to support his decisions.

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[29]*See Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n*, 193 Tenn. 284, 246 S.W.2d 15 (1951); *McKee v. Board of Educations*, 173 Tenn. 269, 117 S.W.2d 752 (1938); *Anderson v. City of Memphis*, 167 Tenn. 648, 72 S.W.2d 1059 (1934).

[30]*Fentress County Beer Board v. Cravens*, 209 Tenn. 679, 356 S.W.2d 260 (1962).

[31]*See also Davison v. Carr*, 659 S.W.2d 361 (Tenn. 1983).

[32]*Id. See also McGee v. State*, 207 Tenn. 431, 340 S.W.2d 904 (1960); *Hewgley v. Trice*, 207 Tenn. 466, 340 S.W.2d 918 (1960).

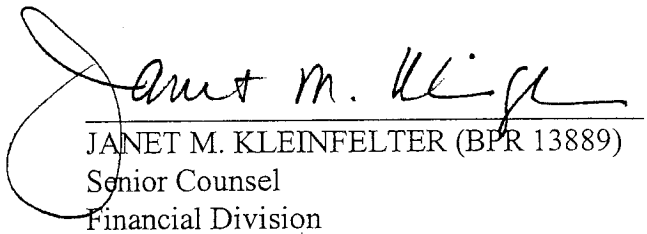
Finally, as this Court is aware, the Commissioner has previously expressed his willingness to an expedited hearing on the petition for writ of certiorari under the common-law writ standard. The Commissioner continues to be willing to have such an expedited hearing on the record. The Commissioner is further willing to have this Court enter a final judgment on Petitioners' petition for writ of certiorari based upon the pleadings filed to date without a hearing. The Commissioner does object, however, to Petitioners' request for an evidentiary hearing, as there simply is no authority or precedent for such.

III. CONCLUSION

For these reasons, the Commissioner respectfully requests that Petitioners' motion be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by first class U.S. Mail, postage prepaid, to: Carroll D. Kilgore, Branstetter, Kilgore, Stranch & Jennings, 227 Second Avenue North, Fourth Floor, Nashville, TN 37201-1631, this 20th day of August, 2004.

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